SUPREME COURT, U. S.

AUG 6 1974

MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1973.

No. 73-2002.

THE PHILADELPHIA HOUSING AUTHORITY, GILBERT STEIN and THOMAS J. KELLY, Individually and in Their Capacity as Past and Present Executive Directors of The Philadelphia Housing Authority; THOMAS McINTOSH, JAMES NOLAN, CARMELITA LARNER, FROSTEENA KEE, and WILLIAM RAFSKY, Individually and in Their Capacity as Members of The Philadelphia Housing Authority,

Petitioners,

v.

BRENDA ALDERMAN, FLOYD SMITH, JERRI WILLIAMS, and KAY DEMING,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

BRIEF FOR RESPONDENTS IN OPPOSITION.

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THE PHILADELPHIA HOUSING AUTHORITY, GILBERT STEIN AND THOMAS J. KELLY, INDIVIDUALLY AND IN THEIR CAPACITY AS PAST AND PRESENT EXECUTIVE DIRECTORS OF THE PHILADELPHIA HOUSING AUTHORITY; THOMAS McINTOSH, JAMES NOLAN, CARMELITA LARNER, FROSTEENA KEE, AND WILLIAM RAFSKY, INDIVIDUALLY AND IN THEIR CAPACITY AS MEMBERS OF THE PHILADELPHIA HOUSING AUTHORITY,

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v.

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Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

BRIEF FOR RESPONDENTS IN OPPOSITION.

I. OPINIONS BELOW.

The opinion of the District Court is reported at 365 F. Supp. (E. D. Pa. 1973). The opinion of the Court of Appeals is reported at 496 F. 2d 164 (3rd Cir. 1974).

II. QUESTIONS PRESENTED.

The Questions Presented by the petitioners substantially miscast the issues raised by the facts of this case. This is not a lawsuit involving the abstract power of a governmental employer "to restrict its employees' political activity and campaigning . . ." (Pet. at 3). Rather, it is a case involving the question of whether the particular means used to limit the speech of governmental employees, i.e. by use of a prior restraint, was constitutional. The Court of Appeals specifically found it was not. Therefore, the following questions are presented:

1. Whether the summary dismissals of the four respondents for refusing to sign a Memorandum which required them to agree, in advance, to totally limit their speech about an important issue was a prior restraint in violation of the First and Fourteenth Amendments to the United States Constitution?

2. Whether the scope and terms of the Memorandum which the respondents refused to sign were so substantially overbroad and vague as to violate the First and Fourteenth Amendments to the United States Constitution?

3. Whether the refusal of a governmental employer to afford its permanent-status employees either a prior or post-termination evidentiary hearing at which the employees could contest their discharges was a violation of the Due Process Clause of the Fourteenth Amendment to the United States Constitution?

III. COUNTER-STATEMENT OF THE FACTS.

Significantly omitted from the petitioners' version of the facts of this case, yet critical to it, are seven facts which illumine the unfairness and selective manner in which the respondents were summarily discharged from their jobs at the Philadelphia Housing Authority ("PHA"). Set forth below, each of these facts are undisputed, having been proved during the proceedings which were conducted in the District Court.

A. The Respondents Were Permanent-Status Employees of PHA.

PHA is a public agency whose legislative purpose is to provide safe and sanitary housing for the public housing tenants of Philadelphia.[1] Although it has no formal tenure system for its employees, PHA has established a complex merit system of employment which grants numerous rights and benefits to those of its employees who have completed a mandatory three-month probationary period.

Each of the respondents successfully completed that probationary period and thus attained "permanent status" employment at PHA (FF 8, Pets.' App. A28). As a result, they acquired specified rights in their jobs. Included among them were rights to reinstatement, to life insurance benefits, to vacation and sick leave, to leaves of absences, to layoff preference and to a retirement pension plan.[2] To

1. Housing Authorities Act of May 28, 1937, Pa. Stat. tit. 35, § 1541 *et seq.*

2. Furthermore, the respondents, during their employment, had two other rights of permanent-status employment—the right to dismissal for cause only and for evidentiary appeals to challenge their dismissals. These rights, however, were summarily suspended by Gilbert Stein, the Executive Director of PHA, because he demanded "a total free hand to move personnel around . . . to dismiss people . . . without having to be restricted in any way" (*see* the Appendix prepared for the appeal in the Third Circuit Court of Appeals at 363A).

both the respondents and PHA, therefore, there clearly existed an objective expectancy that the respondents' employment was both continuous and open-ended.

B. The Respondents Had Compelling Reasons for Not Signing the Stein Memorandum.

The four respondents were summarily discharged from their jobs in the last days of 1972 and the first days of 1973 (FF 48, 58, 69, 79, Pets.' App. 38a-42a). Each was fired for failing to sign the following Memorandum, authored by PHA's then Executive Director, Gilbert Stein:

> No PHA employee shall engage in any form of interference during the upcoming tenant plebiscite to determine whether residents of the PHA-managed properties want to be represented by the RAB Corporation.
>
> * * *
>
> It is the policy of this authority to encourage all tenants to exercise their right to choice . . . but there should be no attempt by PHA employees to discuss RAB politics with tenants, either pro or con.
>
> Any employee who engages in such activity will be subject to immediate dismissal.
>
> /s/ GILBERT STEIN
>
> * * *
>
> I have read the above and understand that as an employee of the Philadelphia Housing Authority, I must abide by this restriction.
>
> .....
> Employee's Signature

(Pets.' App. A3-A4)

Each of the respondents refused to sign this Memorandum because they believed it to be a prior restraint on their freedom of speech (Pets.' App. A67-A68). Each, however, had additional reasons for not signing. Respondents Alderman and Williams were themselves public housing tenants hired, in part, pursuant to a federal policy affording preference in employment to public housing tenants.[3] Each was unsure whether the Stein Memorandum prohibited them from discussing the proposed tenant plebiscite with their families, friends or neighbors. Respondent Smith had also lived in public housing at one time, still had many friends who were tenants there, and was confused as to whether he could answer questions his friends might have about the election. Respondent Deming was a professional social worker at PHA. Part of her responsibilities included discussions and advice to public housing tenants about their living conditions. She was uncertain whether the Memorandum prevented her from even recommending to a tenant-client that he or she ought to seek assistance for their problem from the Resident Advisory Board ("RAB").

C. PHA Failed to Afford the Respondents Any Hearing at Which They Could Contest Their Discharges.

Neither petitioners Gilbert Stein nor PHA itself issued any guidelines or regulations clarifying or interpreting the Stein Memorandum. In addition, neither provided PHA employees with any mechanism by which they could request or receive advisory opinions concerning the meaning and scope of the prohibitions contained in the Memorandum.

To the contrary, each respondent unsuccessfully attempted to obtain a clarification of those prohibitions. They wrote letters, to which they received no response; they re-

3. The National Housing Act, as amended August 1, 1968, 12 U. S. C. § 1701(u).

quested meetings, which were either not held or at which no discussion of the Memorandum was allowed; and they asked questions, which were not answered. Instead, they were summarily discharged without even the benefit of either a prior or post-termination hearing at which to contest their firings.

D. There Is No Evidence Supplying Any Factual Justification for the Stein Memorandum.

Stein issued his Memorandum because he "felt certain" that it was necessary to prevent interference with the election (FF 17, Pets.' App. A30). But the record is totally devoid of any evidence which could even arguably support Stein's subjective impressions. Prior to the issuance of the Memorandum, neither Stein nor PHA could point to any known incident of PHA employees discussing the then pending election or interfering with it. There is no evidence that any PHA employee attempted to influence, coerce or persuade tenants with respect to the election. There is no evidence of complaints by tenants even alleging such interference. There is no evidence with respect to confrontations, violent or otherwise, between members of RAB and employees of PHA in any manner relating to the election. There is no evidence that any PHA employee failed to devote his energy to his regular duties because of the pending election. As the Court of Appeals observed, the issuance of this Memorandum can be traced only to a "relatively spontaneous decision" of Mr. Stein (Pets.' App. A18).

E. Other PHA Employees Failed to Sign the Stein Memorandum But Were Not Discharged From Employment.

The Stein Memorandum was distributed to PHA employees in November, 1972 and was to be signed and re-

turned to Ms. Karen Vandenhengle, an employee in PHA's personnel department (FF 22, Pets.' App. A33-A34). Ms. Vandenhengle's records revealed that 65 to 70 employees failed to sign the Memorandum and, except for the four respondents, all of those 65 to 70 employees remained employed at PHA and were not disciplined in any way for not signing it (FF 23, Pets.' App. A34). Furthermore, of those 65 to 70 employees, only about 14 ever gave "reasons" for not signing the Memorandum. But, even for these 14, Ms. Vandenhengle was unable to explain why they had not signed by the time she testified in court (over five months after the Memorandum was due). Moreover, nothing in the Memorandum excused any employee for not signing.

F. None of the Respondents in Any Way Violated the Prohibitions of the Stein Memorandum.

It is undisputed that the four respondents did not discuss the proposed RAB election, nor RAB politics, nor did they interfere in any manner with the election. The District Court so found (FF 26, Pets.' App. A34) and in its Conclusions of Law ("C. L.") wrote:

> Since the plaintiffs engaged in no actual conduct that in any way adversely affected any interest of the Philadelphia Housing Authority, their dismissal was solely because they would not agree, in advance, to limit their speech. (C. L. 7, Pets.' App. A68).

G. The Petitioners Themselves Violated the Restraints Imposed by the Stein Memorandum.

While it is conceded that the respondents in no way violated the Stein Memorandum, the same cannot be said of the petitioners. Using the most effective means at their disposal, they published an article in PHA's official news-

paper, "The Good Neighbor," which accused the RAB of being "fat", "happy", "irresponsible" and intent upon "subverting the democratic process." The article was entitled "Report to the People of Philadelphia" and was authored by petitioner Gilbert Stein on the occasion of his resignation from the position of Executive Director of PHA.

The article was published on March 2, 1973, just two months after the respondents' dismissals. It was mailed directly to all public housing tenants in Philadelphia. Although the article was an unmistakable violation of the Stein Memorandum, dropping even the supposed appearance of impartiality which PHA now strives to recreate, no one at PHA responsible for its publication was discharged or even disciplined for their actions. Had PHA been so zealously concerned about neutrality in the proposed election, it would hardly have published Mr. Stein's vituperative attack against RAB.

IV. REASONS FOR DENYING THE WRIT.

Although the petitioners have artfully avoided analyzing this case in terms of "prior restraint", their evasion of that issue cannot conceal its central presence in this litigation. The issue is not, as petitioners would lead this Court to believe, whether PHA had the power to limit the speech and political activity of its employees. That is an abstract issue not presented in the courts below. Rather, the issue is whether the dismissals of the respondents for not agreeing, in advance, to totally limit their freedom of speech was a prior restraint in violation of the first amendment. Having approached the case in that context, the Court of Appeals entered an Opinion and Judgment in favor of the respondents.

A. The Decision Below Is Correct.

None of the respondents, indeed not one PHA employee, was discharged from his or her job because they "interfered" with the scheduled (but never held) tenant election or because they discussed "RAB politics" with any tenant. The petitioners have never claimed otherwise. Instead, the four respondents were fired for not *signing* a Memorandum which forbade *all* discussion by them of the RAB plebiscite. Their discharges, therefore, present the classic example of the imposition of a prior restraint upon speech. Emerson, *The Doctrine of Prior Restraint,* 20 Law & Contemporary Problems, 648, 655-660 (1955).

Over the years, this Court has repeatedly condemned similar prior restraints upon speech, and has required, instead, the application of subsequent penalties to the conduct alleged to be unprotected by the First Amendment. *See, e.g., New York Times, Inc. v. United States,* 403 U. S. 713

(1971); *Organization for a Better Austin v. Keefe*, 402 U. S. 415 (1971); *Near v. Minnesota*, 283 U. S. 697 (1931). In each of these decisions, the Court has reiterated the proposition, expressed by Mr. Chief Justice Hughes in *Lovell v. Griffin*, 303 U. S. 444, 451-452 (1938), that the elimination of prior restraints was a "leading purpose" behind the first amendment's adoption in 1791.

Consistent with that statement, the Court has held that: "[a]ny system of prior restraints of expression comes to this Court bearing a heavy presumption against its constitutional validity." *Bantam Books, Inc. v. Sullivan*, 372 U. S. 58, 70 (1962). Applying that standard of review, the Court has not sanctioned even one prior restraint on speech colorably protected by the First Amendment.

Against this array of caselaw, and in an attempt to meet their "heavy burden", the petitioners strain to justify the Stein Memorandum and the dismissal of the respondents for not signing it on the attenuated theory that PHA felt compelled to prevent its employees from interfering in the tenant election. For several reasons, that argument is fallacious.

First, the petitioners never introduced any evidence indicating that any PHA employee, prior to the issuance of the Stein Memorandum, spoke out with respect to the proposed election, interfered with it, discussed it with public housing tenants, or even intended to do any of these things. Nor was there any evidence that any public housing tenant felt influenced, coreced or intimidated by PHA employees. In fact, all of the evidence was to the contrary. The only evidence the petitioners could adduce to support the prior restraint imposed by the Memorandum was Gilbert Stein's fear that PHA's employees might interfere with the election. To a similar argument, Mr. Justice Brandeis once wrote:

> Fear of serious injury cannot alone justify suppression of free speech and assembly. Men feared witches and burnt women. It is the function of free speech to free men from the bondage of irrational fears. *Whitney v. California*, 274 U. S. 357, 376 (1927) (concurring opinion).

Second, if the RAB election was the alleged reason for the Stein Memorandum, its function in that regard was vitiated by the fact that it was cancelled on December 11, 1972 as a result of a Stipulation executed in court between PHA and RAB. The cancellation preceded the respondents' dismissals. To this day, no tenant plebiscite of any kind has been held by PHA.

Third, the Stein Memorandum was selectively and discriminatorily enforced. On the one hand, PHA summarily dismissed the four respondents for not signing the Memorandum yet, on the other, it failed to discharge, much less discipline, 65 to 70 other employees who also failed to sign it. In addition, PHA itself and Gilbert Stein as its Executive Director, published an article, distributed to all public housing tenants, accusing the Resident Advisory Board of being "fat", "happy", "irresponsible" and intent upon "subverting the democratic process." This is censorship of classic proportions. *See Staub v. Baxley*, 355 U. S. 313 (1958); *Cf. Police Department v. Mosley*, 408 U. S. 92, 96 (1972). As such, "[i]t is clearly unconstitutional [because it] enable[d] a public official to determine which expressions of view will be permitted and which will not . . ." *Cox v. Louisiana*, 379 U. S. 536, 557 (1965).

Finally, petitioners enforced this censorship system in a procedurally arbitrary manner. They refused to afford the respondents either a prior or post-termination hearing at which they could contest their firings. This too

rendered the dismissals unconstitutional because a "non-criminal process of prior restraints upon expression 'avoids constitutional infirmity only if it takes place under procedural safeguards designed to obviate the dangers of a censorship system.'" *Carroll v. President and Commissioners of Princess Anne,* 393 U. S. 175, 181 (1968).

B. The Decision of the Court of Appeals Does Not Conflict With Any Decision of This Court.

Straining for support for the grant of the Writ, the petitioners argue that this Court's decisions in *United States Civil Service Commission v. National Association of Letter Carriers,* 413 U. S. 549 (1973), *Broadrick v. Oklahoma,* 413 U. S. 601 (1973) and *Arnett v. Kennedy,* — U. S. —, 40 L. Ed. 2d 15 (1973) conflict with the decision below of the Court of Appeals. Not only is this incorrect, but these cases actually support the position of the respondents.

First, none of them are prior restraint cases. *Letter Carriers and Broadrick* were, respectively, attacks upon the constitutionaltiy of section 9(a) of the Hatch Act, 5 U. S. C. § 7324(a)(2) which prohibits federal employees from taking "an active part in political management or political campaigns", and an Oklohoma statute similarly worded. *Arnett* involved the dismissal of a federal employee for making defamatory remarks about his superiors. In each case, the employees were subsequently disciplined for having done what was prohibited by the statutes or regulations involved. They were not, however, fired for refusing to sign a pledge requiring total silence on a matter of social and political importance. In fact, in *Broadrick* the Court specifically distinguished cases where political conduct "has required official approval under laws that delegated standardless discretion to local fune-

tionaries, resulting in virtually unreviewable *prior restraints* on First Amendment rights." 413 U. S. at 613 (emphasis added).

Second, the Hatch Act is narrowly drawn. It prohibits only active participation in political management or campaigns, while specifically acknowledging the rights of employees to "express [their] opinion on political subjects and candidates." 5 U. S. C. § 7324(b). The Court has consistently stated that this exception saves the Act from unconstitutionality. *Letter Carriers,* 413 U. S. at 575-6 and *United Public Workers v. Mitchell,* 330 U. S. 75, 100 (1947). The Stein Memorandum, on the other hand, seeks to censor all speech, even the most private, with respect to a political issue of considerable importance.[4] In other words, it does precisely that which Congress refrained from doing in the Hatch Act.

Third, unlike the Stein Memorandum, the Hatch Act was supported by compelling evidence of harm to the governmental structure. Before the court were detailed findings of Congress on the evils of the spoils system, dating as far back as the Jefferson administration. *Letter Carriers,* 413 U. S. at 564-567. By contrast, and as noted by the Court of Appeals, nothing in this record shows "that there were any deliberations (extended or otherwise) before the issuance of the memorandum . . ." (Pets.' App. A18, n. 56). Consequently, unlike the deference accorded Congress in *Letter Carriers,* no such deference should be accorded Mr. Stein, a non-elected administrator who is unaccountable to the electorate. *See Bridges v. California,* 314 U. S. 252, 260-261 (1941).

4. This supports an independent attack on the grounds of substantial overbreadth. Alternatively, if the Stein Memorandum does not mean what it says, it is void for vagueness. Stein testified that his own attack against RAB in the "Good Neighbor" was not prohibited by the Memorandum. If this is so, the Memorandum is indecipherable.

Finally, the statutes and regulations sustained in *Letter Carriers, Broadrick* and *Arnett* had procedural protections not present in the Stein Memorandum. Both the Civil Service Commission (in *Letter Carriers* and *Broadrick*) and the Office of Economic Opportunity (in *Arnett*) had (a) issued detailed regulations defining the range of forbidden activities, (b) established a procedure by which they would give an opinion with respect to a proposed course of conduct, (c) provided evidentiary hearings for disciplined employees and (d) did not act selectively or arbitrarily. The petitioners respected none of these principles in issuing and enforcing the Stein Memorandum.

Based upon these factors, the Court of Appeals distinguished *Letter Carriers* and *Broadrick*. For the same reasons, *Arnett* is distinguishable. All three, therefore, support and do not conflict with the decision below.

C. The Court of Appeals Did Not Decide Any Procedural Due Process Issue.

Because the Court of Appeals decided this case on the issue of prior restraint only, it was unnecessary for it to reach, and it did not reach, respondents' claims that they had Fourteenth Amendment "property interests" in their jobs. That issue, as well as the related claim that respondents were entitled to evidentiary hearings to contest their dismissals, are not therefore properly before this Court.

While conceding this, the petitioners strenuously contend that the Judgment of the Court of Appeals exceeds the scope of its Opinion because the Judgment reverses the May 15, 1973 Order of the District Court which granted the petitioners' motion to dismiss the respondents' due process claims. Even if this were so, it most likely is a technical error. Certainly, the petitioners could have moved

the Court of Appeals to amend its Judgment. Having failed to pursue that obvious approach, the petitioners have raised a contrived and unnecessary argument as a basis for the issuance of the Writ.

However, even assuming *arguendo* that the Court of Appeals reached the due process issue, the petitioners incorrectly conclude that its decision conflicts with Pennsylvania law with respect to whether the respondents had "property interests" in their jobs. *Cf. Board of Regents v. Roth,* 408 U. S. 564, 577 (1972). First, repeated decisions of the Pennsylvania Supreme Court reaffirm the principle that governmental workers are employed at will *unless* the legislature has conferred upon the employing agency the power to enter into contracts of employment with them. *See,* e.g., *American Federation of State, County, and Municipal Employees v. Shapp,* 433 Pa. 527, 280 A. 2d 375, 377 (1971) and *Scott v. Philadelphia Parking Authority,* 402 Pa. 151, 166 A. 2d 278, 282 (1960).

Here, since 1937 the Pennsylvania legislature has granted the Philadelphia Housing Authority the power to hire "permanent or temporary" employees as it may need and desire. Pa. Stat. tit. 35, § 1547. Pursuant to that legislative authority, the respondents were initially hired as "probationary employees" of PHA, and, after a review of their probationary performance, they were granted "permanent employee" status. As such, they acquired specific rights in their jobs not granted to probationary employees (*see* III A, *supra*). These rights created an "objective", as opposed to a "unilateral" expectation of continued employment at PHA. Accordingly, the respondents were invested with fourteenth amendment property rights as required by *Roth, supra,* 408 U. S. at 578.

Second, *Roth* and its companion case, *Perry v. Sinderman,* 408 U. S. 593 (1972) hold that governmental em-

ployees are entitled to some form of evidentiary hearing, regardless of their employment status, if they are deprived of an interest protected by the first amendment. *Roth,* 408 U. S. at 569-570, *Perry,* 408 U. S. at 699. This is exactly the sort of procedural protection which PHA failed to afford the respondents. That failure further infects the respondents' dismissals with unconstitutionality. *Cf. Connell v. Higginbotham,* 403 U. S. 207, 208 (1971).

V. CONCLUSION.

While any case involving the first amendment presents conceptually significant issues, this case is *sui generis* and not worthy of review in this Court. We know of no reported case in which a governmental agency has imposed the kind of prior restraint on its employees which PHA imposed upon the respondents. The petitioners have not cited any to compare with it. Furthermore, Mr. Stein is no longer with PHA; his aberrent behavior is unlikely to be repeated; and the specific election with which his Memorandum dealt was cancelled long ago.

It is respectfully submitted, therefore, that the petition For Writ of Certiorari should be denied.

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